

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs May 13, 2009

LACARL TERRELL TIGG v. STATE OF TENNESSEE

Appeal from the Circuit Court for Rutherford County
No. F-61364 Don R. Ash, Judge

No. M2008-01874-CCA-R3-PC - Filed June 10, 2009

The Petitioner, LaCarl Terrell Tigg, appeals as of right the Rutherford County Circuit Court's denial of his petition for post-conviction relief. The Petitioner alleges that his guilty plea to sale of 0.5 grams or more of cocaine, a Class B felony, was not voluntarily, knowingly, and understandingly entered due to the ineffective assistance of counsel. Specifically, he contends that trial counsel failed to investigate and adequately advise him on his case and that he was coerced into pleading guilty. After the appointment of counsel and an evidentiary hearing, the post-conviction court found that the Petitioner failed to prove his allegations by clear and convincing evidence and denied the petition. Following our review of the record, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which ALAN E. GLENN and ROBERT W. WEDEMEYER, JJ., joined.

John Baker, Murfreesboro, Tennessee, for the appellant, LaCarl Terrell Tigg.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Senior Counsel; William Whitesell, District Attorney General; and Trevor H. Lynch, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

The Petitioner pleaded guilty to sale of 0.5 grams or more of cocaine, a Class B felony. See Tenn. Code Ann. § 39-17-417. At the March 23, 2007 guilty plea hearing, the State provided the facts supporting the Petitioner's plea:

[O]n or about November 19th, 2003, a confidential informant working at the direction of Murrell Beane of the Murfreesboro Police Department purchased a quantity of cocaine from [the Petitioner] in excess of 0.5 grams. The transaction was recorded through a video camera system and recorded electronically through audio capabilities.

The videotape was entered as an exhibit.

During the hearing, the trial court spoke with the Petitioner regarding his trial rights, and the Petitioner responded appropriately to questions. Upon questioning by trial counsel, the Petitioner acknowledged that he had six prior felony convictions, classifying him as a career offender, but that he was pleading guilty to a persistent offender classification. At the conclusion of the hearing, the trial court imposed the agreed-upon sentence: a thirty-year sentence as a Range III, persistent offender (release eligible after service of 45%) and to be served consecutively to a prior conviction.

The Petitioner sought post-conviction relief and delivered his petition to prison authorities on March 13, 2008.¹ In his petition,² the Petitioner asserted that his trial counsel was ineffective in his representation and that his guilty plea was constitutionally infirm.³ A hearing was held on July 7, 2008, at which only the Petitioner testified. Trial counsel did not testify.

The Petitioner testified that, when he was asked at the guilty plea hearing if he was coerced into pleading guilty, he responded that no one had forced him to plead guilty. He admitted that he also affirmatively stated that his lawyer did a good job and that he had no complaints about his representation. However, the Petitioner now alleged at the post-conviction hearing that trial counsel actually did not communicate with him or meet with him often. When asked about trial counsel's investigation of the case, the Petitioner replied that "all he ever looked at was" the videotape of the Petitioner selling a controlled substance.

The Petitioner was then asked about his understanding of the plea agreement. He confirmed that he and trial counsel discussed the plea offer. The Petitioner desired a sentence of twenty-five years to be served at 45% rather than the thirty years at 45% being offered by the State; however, trial counsel was unable to secure such an agreement for the Petitioner. According to the Petitioner, trial counsel informed him that the State would only agree to a twenty-five-year sentence if he agreed

¹ The petition was not filed until April 3, 2008.

² Counsel was appointed to represent the Petitioner in his post-conviction action, but no amended petition was filed.

³ The Petitioner also submitted that his sentence was unconstitutionally imposed based on Blakely v. Washington, 542 U.S. 296 (2004). However, the Petitioner abandoned this ground at the hearing and on appeal and, thus, the issue is waived. Moreover, the Petitioner admitted at the guilty plea hearing that he had six prior felony convictions.

not to go forward on another pending petition for post-conviction relief on an unrelated rape conviction; it felt like “bribery” to the Petitioner. The Petitioner testified that he wanted to go trial but, after becoming frustrated with trial counsel, he agreed to plead guilty.

On cross-examination, the Petitioner acknowledged that he had pleaded guilty twice to this crime, pleading guilty again after his initial plea was set aside.⁴ He also admitted that trial counsel showed him the Tennessee Bureau of Investigation (TBI) report regarding the amount of cocaine sold.

The post-conviction court questioned the Petitioner, asking him if he remembered his constitutional rights being reviewed with him at the guilty plea hearing. He stated that he did recall answering that no one had forced him to plead guilty, that he was satisfied with his attorney’s representation, and that he had no complaints with trial counsel.

After hearing the evidence presented, the post-conviction court denied relief. The post-conviction court ruled that the Petitioner had not satisfied his burden of proving that trial counsel was ineffective, noting that trial counsel reviewed the videotape, as well as the other evidence in this case, with the Petitioner. The post-conviction court further determined that the Petitioner was well-informed of his rights and the charges against him and that he thus made an intelligent and knowing decision to plead guilty. An order was entered to this effect on July 14, 2008. This appeal followed.

ANALYSIS

On appeal, the Petitioner argues that the post-conviction court erred in denying him relief because: (1) Trial counsel failed to investigate and adequately advise him about his case; and (2) He was under duress at the time he entered his plea because trial counsel told him that the State required him to forego his other post-conviction petition in order to receive a twenty-five-year sentence. To sustain a petition for post-conviction relief, a petitioner must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. See Tenn. Code Ann. § 40-30-110(f); Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). Upon review, this Court will not reweigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the post-conviction judge, not the appellate courts. See Momon, 18 S.W.3d at 156; Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). The post-conviction judge’s findings of fact on a petition for post-conviction relief are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against those findings. See Momon, 18 S.W.3d at 156; Henley, 960 S.W.2d at 578.

⁴ The Petitioner had previously entered an “open” plea to this charge and, following a sentencing hearing, received a thirty-year sentence as a career offender (release eligible after service of 60%). He filed a petition for post-conviction relief, apparently arguing that he did not understand the sentencing range at the time he entered his plea. The trial court granted relief and set aside the conviction.

The Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to “reasonably effective” assistance, that is, within the range of competence demanded of attorneys in criminal cases. Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer’s assistance to his or her client is ineffective if the lawyer’s conduct “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the defendant’s lawyer and actual prejudice to the defense caused by the deficient performance. Id. at 687; Burns, 6 S.W.3d at 461. The defendant bears the burden of establishing both of these components by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The defendant’s failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

This two-part standard of measuring ineffective assistance of counsel also applies to claims arising out of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58 (1985). The prejudice component is modified such that the defendant “must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” Id. at 59; see also Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

In evaluating a lawyer’s performance, the reviewing court uses an objective standard of “reasonableness.” Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel’s choices “and should indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel’s tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel’s alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court’s determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court’s findings of fact with regard to the effectiveness of counsel under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. Id. “However, a trial court’s conclusions of law—such as whether counsel’s performance was deficient or whether that deficiency was prejudicial—are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court’s conclusions.” Id. (emphasis in original).

Once a guilty plea has been entered, effectiveness of counsel is relevant only to the extent that it affects the voluntariness of the plea. In this respect, such claims of ineffective assistance necessarily implicate the principle that guilty pleas be voluntarily and intelligently made. Hill v. Lockhart, 474 U.S. at 56 (citing North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 164 (1970)).

When a guilty plea is entered, a defendant waives certain constitutional rights, including the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront witnesses. Boykin v. Alabama, 395 U.S. 238, 243 (1969). “A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.” Id. at 242. Thus, in order to pass constitutional muster, a guilty plea must be voluntarily, understandingly, and intelligently entered. See id. at 243 n.5; Brady v. United States, 397 U.S. 742, 747 n.4 (1970). To ensure that a guilty plea is so entered, a trial court must “canvass[] the matter with the accused to make sure he [or she] has a full understanding of what the plea connotes and of its consequence[s].” Boykin, 395 U.S. at 244. The waiver of constitutional rights will not be presumed from a silent record. Id. at 243.

In State v. Mackey, 553 S.W.2d 337 (Tenn. 1977), the Tennessee Supreme Court set forth the procedure for trial courts to follow in Tennessee when accepting guilty pleas. Id. at 341. Prior to accepting a guilty plea, the trial court must address the defendant personally in open court, inform the defendant of the consequences of a guilty plea, and determine whether the defendant understands those consequences. See id.; Tenn. R. Crim. P. 11. A verbatim record of the guilty plea proceedings must be made and must include, without limitation, “(a) the court’s advice to the defendant, (b) the inquiry into the voluntariness of the plea including any plea agreement and into the defendant’s understanding of the consequences of his entering a plea of guilty, and (c) the inquiry into the accuracy of a guilty plea.” Mackey, 553 S.W.2d at 341.

However, a trial court’s failure to follow the procedure mandated by Mackey does not necessarily entitle the defendant to seek post-conviction relief. See State v. Prince, 781 S.W.2d 846, 853 (Tenn. 1989). Only if the violation of the advice litany required by Mackey or Tennessee Rule of Criminal Procedure 11 is linked to a specified constitutional right is the challenge to the plea cognizable in post-conviction proceedings. See Bryan v. State, 848 S.W.2d 72, 75 (Tenn. Crim. App. 1992). “Whether the additional requirements of Mackey were met is not a constitutional issue and cannot be asserted collaterally.” Johnson v. State, 834 S.W.2d 922, 925 (Tenn. 1992).

Here, the Petitioner claims that trial counsel failed to investigate the facts of his case. The Petitioner also argues that he was not sufficiently advised before entering his plea and that he was unduly coerced into pleading guilty. The post-conviction court obviously did not accredit the testimony of the Petitioner.

The Petitioner faced sentencing as a career offender due to his six prior felony convictions. The Petitioner confirmed that, in exchange for his plea, he was classified as a Range III, persistent offender, with release eligibility after service of 45% of his sentence rather than the 60% required

for career offenders. The Petitioner did not provide any evidence, other than his own testimony, that trial counsel conveyed a coercive offer from the State, amounting to “bribery.” The Petitioner testified that he watched the videotape with trial counsel and received a copy of the TBI report.

In this case, the trial judge did advise and question the Petitioner as mandated by Mackey. The guilty plea transcript reveals that the trial judge carefully reviewed the rights that the Petitioner was waiving and confirms that the Petitioner responded appropriately to questions. The Petitioner was asked if he had any complaints about trial counsel, and he answered in the negative. The Petitioner also affirmed that he had not been forced or coerced into pleading guilty. In our view, the record reflects that the Petitioner knew and understood the options available to him prior to the entry of his guilty plea, including the right not to plead guilty and demand a jury trial, and he freely made an informed decision of that course which was most palatable to him at the time.

The Petitioner has failed to show that trial counsel did not adequately investigate his case or advise him as to his plea or that he was unduly pressured into pleading guilty. The evidence does not preponderate against the findings of the post-conviction court. In consequence, the Petitioner has failed to establish that his guilty plea was not knowing or that he was denied the effective assistance of counsel.

CONCLUSION

Based upon the foregoing, we conclude that the post-conviction court did not err by denying post-conviction relief. Accordingly, we affirm the judgment of the Rutherford County Circuit Court.

DAVID H. WELLES, JUDGE